No. 94-319

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In The

Supreme Court of the United States

October Term, 1994

LONG DISTANCE SERVICE OF WASHINGTON, INC. and RICHARD J. RICE,

Petitioners,

vs.

MID ATLANTIC TELECOM, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Can a business competitor state a RICO claim against another business and its principal which committed wire and mail fraud against the competitor's customers with the intent to cause those customers to leave the competitor, cause financial injury to the competitor and put the competitor out of business, where such injury to the competitor was a foreseeable consequence of the predicate acts of wire and mail fraud?

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TO THE HONORABLE SUPREME COURT:

The Respondent, Mid Atlantic Telecom, Inc. ("Mid Atlantic"), respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, Long Distance Service of Washington, D.C., Inc. ("LDS") and Richard J. Rice ("Rice").

COUNTERSTATEMENT OF THE CASE

This action commenced on February 6, 1992 when Mid Atlantic Telecom, Inc., a resale common carrier filed a Complaint alleging that LDS another resale common carrier and its President, violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, tortiously interfered with the contractual and business relationships of Mid Atlantic and engaged in unfair competition.

Mid Atlantic filed an Amended Complaint after LDS and Rice moved to dismiss the Complaint. Therein, it was alleged that LDS, at the direction of Rice, had developed a computer billing program which allowed them to randomly add minutes to the calls made by their customers. The effect of this was to inflate the length of time of the calls made, thereby increasing LDS's revenues. (Amended Complaint at Paragraphs 12, 13, 15). LDS and Rice then embarked on a deliberate campaign to target Mid Atlantic's customers, lured them with false representations of lower rates causing many customers to leave Mid Atlantic, and reduced Mid Atlantic's revenues from those customers and from customers which Mid Atlantic retained by matching LDS's false rates. (Amended Complaint at Paragraphs 14, 17, 20, 25, 26). It was further alleged that LDS also lured away Mid Atlantic's wholesale customers causing further lost revenues. (Amended Complaint at Paragraph 19). LDS and Rice intended to injure Mid Atlantic and put it out of business. (Amended Complaint at 20, 22). Of course, LDS and Rice also intended to and did enrich themselves both by obtaining the additional customers and by receiving the additional revenues earned through the fraudulent billing scheme. Mid Atlantic sought damages of $1,500,000 in each count, trebled to $4,500,000 along with attorneys' fees in Count One.

On March 17, 1992, after service of the Complaint, but prior to filing the Amended Complaint, Mid Atlantic served a Document

Request on LDS. *See* Notice of Service of Request for Production of Documents. Ten days later LDS and Rice moved to dismiss the Complaint. Mid Atlantic responded by filing the Amended Complaint and opposing the Motion to Dismiss. LDS and Rice then moved to dismiss the Amended Complaint or for Summary Judgment, filed affidavits claiming that employees of Mid Atlantic had knowledge of the alleged scheme, could not show reliance and that Mid Atlantic was not a competitor of LDS. They moved for a stay of discovery. Mid Atlantic opposed the motion filed affidavits and argued that it was entitled to discovery before the Court should consider the summary judgment request.

Without allowing Mid Atlantic to take discovery, the lower court granted LDS and Rice's motion on March 10, 1993, holding that "the standards established by the Supreme Court of the United States in *Holmes v. Securities Investor Protection Corp.*, __ U.S. __, 112 S. Ct. 1311 (1992), in which the Supreme Court set forth the outer limits of proximate cause, preclude, in this Court's view, plaintiff from seeking the damages which plaintiff claims in this case." (App. 11a). In a Revised Order of March 21, 1993, the court declined to exercise supplemental jurisdiction over Mid Atlantic's state law claims and dismissed them without prejudice. (App. 13a).

The Fourth Circuit vacated the trial court's grant of summary judgment, finding that the alleged solicitations of Mid Atlantic's customers by Rice and LDS could have been the proximate cause of Mid Atlantic's injuries. (App. 8a). The unanimous panel hearing the case concluded that "A finding of proximate cause in such a situation [as alleged by Mid Atlantic that Rice and LDS included Mid Atlantic as a direct target] would not be at odds with the Supreme Court's holding in *Holmes*, since Mid Atlantic is not seeking to vindicate the rights of its former customers who may have been offered fraudulently low rates. Furthermore, Mid Atlantic's injuries, as alleged, are not derivative of any losses suffered by its former customers. Rather, it claims distinct and

independent injuries; lost customers and lost revenue due to the necessity of offering lower rates to match LDS's fraudulent ones." (App. 9a). The court further determined that the lower court abused its discretion in granting summary judgment before Mid Atlantic had the opportunity to develop support for its claims through discovery. (App. 9a). The Fourth Circuit did not reach the reliance issue. (App. 10a). Only three of the fourteen active judges of the Fourth Circuit voted to rehear the case in banc. None of the judges in the panel hearing the case wanted to rehear the case. (App. 14a).

SUMMARY OF THE ARGUMENT

I. In *Holmes v. Securities Investor Protection Corp.*, __ U.S. __, 112 S. Ct. 1311 (1992), this Court held that in order for a person to assert a claim under the RICO Act his injuries must have been proximately caused by the predicate acts of the defendants. The Court explained that various factors must be considered by the court in determining whether there is proximate cause, so that one whose injuries are contingent and remote cannot recover. The court below applied the various factors generally used to determine that under the allegations in the Amended Complaint, Mid Atlantic's injuries were proximately caused by LDS and Rice's predicate acts of mail and wire fraud.

The decision in *Holmes, supra,* does not preclude a finding of proximate cause. The Court did not restrict recovery under RICO only to those persons who received a fraudulent wire or mailing. It sought merely to eliminate from the universe of plaintiffs those persons whose harm flowed merely from misfortunes visited upon them by defendant's acts aimed at other persons and with other intended victims.

II. LDS and Rice have failed to identify any decision of any other court of appeals which is inconsistent with the decision below. The courts of appeal which have considered the issue of

proximate cause under the RICO Act since *Holmes* have applied the factors in similar factual situations to that presented herein in precisely the same manner as did the Fourth Circuit.

III. This case does not present an issue before this Court as to whether the activities of LDS and Rice constitute wire or mail fraud. The Amended Complaint contains all of the necessary allegations to state a claim for wire or mail fraud against LDS and Rice. However, Mid Atlantic is not seeking recovery for wire or mail fraud committed against it; it is seeking recovery for injuries to its business or property suffered by reason of LDS and Rice's alleged predicate acts of mail and wire fraud. That is all that is required to state a RICO claim.

REASONS FOR DENYING THE WRIT

I.

THE FOURTH CIRCUIT PROPERLY APPLIED THE PRINCIPLES OF PROXIMATE CAUSE.

In *Holmes v. Securities Investor Protection Corp.*, __ U.S. __, 112 S. Ct. 1311, 1318 (1992), the Supreme Court held that for there to be liability by a defendant to a particular plaintiff under the RICO act the plaintiff must show that its injuries were proximately caused by defendant's acts explaining that "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." Therein, this Court concluded that the injuries suffered by the broker-dealers' customers were merely derivative of the injuries suffered by the investment firms themselves and refused to find that SIPC, let alone the nonpurchasing customers who lost money when the broker-dealers became insolvent, was proximately injured by the perpetrators of the stock manipulation scheme, "since only the intervening insolvency" of the broker-dealers connected the RICO

"conspirators' acts to the losses suffered for which recovery was sought." *Id.* at 1319.

LDS and Rice try to read a restriction into *Holmes* which does not exist. Nowhere in *Holmes* does this Court state that only persons who were the victims of the wire and mail fraud can sue under RICO. Such a reading would not only render without meaning the requirement that a plaintiff must show that he was injured "by reason of" the predicate acts of racketeering activity but would reduce RICO to a private cause of action available only to persons who were actually defrauded by wire or mail communications directed to them. That does not mean, however, that there is no proximate cause and that Mid Atlantic was not injured in its "business or property by reason of" LDS and Rice's acts of wire and mail fraud. 18 U.S.C. § 1964(c).

In her concurring opinion in *Holmes,* Justice O'Connor, citing to the Supreme Court's previous rulings giving the RICO act a broad sweep, including *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479 (1985), explained that the statutory terms "by reason of" "operate . . . to confine RICO's civil remedies to those whom the defendant has truly injured in some meaningful sense." 112 S. Ct. at 1323. Justice O'Connor further explained that the proximate cause analysis does not preclude a nonseller or nonpurchaser of securities from being RICO plaintiffs. 112 S. Ct. at 1323-24. The act does not contain any purchaser/seller standing requirement. 112 S. Ct. at 1323.

Moreover, this Court has made it clear that a competitive injury, such as that to Mid Atlantic, is clearly the type of injury within the protection of the RICO Act. In *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 473 U.S. 479 (1985), this Court rejected the trial court's restriction allowing RICO claims only by those who suffer a racketeering injury or a competitive injury.

This Court recognized in *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 535-36 (1983), that common law proximate cause cannot be subject to a "precise test", but should instead be determined by looking at previously decided cases which "identify factors that circumscribe and guide the exercise of judgment." The court must look at a number of factors, including the intent to cause the harm, the nature of the injury, the purpose of the Act at issue, and the directness or indirectness of the injury. 459 U.S. at 537-40. The court below looked at these very factors. In distinguishing the facts of this case from its earlier decision in *Brandenburg v. Seidel,* 859 F.2d 1179 (4th Cir. 1988), the Fourth Circuit Court first stated that unlike in *Brandenburg,* the intervening acts herein were not wholly independent of the alleged predicate acts, since it was alleged that while the scheme may only have been initially aimed at defrauding LDS customers, Mid Atlantic was a direct target. (App. 8a). The court then explained that unlike the situation in *Holmes,* Mid Atlantic is not seeking to vindicate the rights of its former customers, and its losses "are not derivative of any losses suffered by its former customers." (App. at 9a). Instead, Mid Atlantic claims "distinct and independent injuries" due to LDS's fraud. (App. at 9a).

Contrary to the Petition, the Fourth Circuit's decision was not inconsistent with *Holmes, supra* or *Brandenburg, supra.* In *Brandenburg,* the Fourth Circuit, consistent with the common law, held that in determining whether a particular set of facts establish proximate cause, the court should make a determination as a matter of law, "taking into consideration such factors as the foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal connection." 859 F.2d at 1189. Therein, the Fourth Circuit found as a matter of law that the misrepresentations allegedly made by the defendants were not "so significant and important a cause" of plaintiffs' loss that they should be held responsible, concluding that they were not

"injured in [their] business or property by reason of [the defendants' alleged] violation of Sec. 1962." 859 F.2d at 1189-90.[1] In this case, the Fourth Circuit conducted precisely the same analysis it conducted in *Brandenburg*. Under Mid Atlantic's allegations, which must be accepted as true, the court found that Mid Atlantic's injuries could have been proximately caused by LDS and Rice's acts. (App. at 9a).

While a conclusion of proximate cause is a legal conclusion it is one that is highly fact specific. As this Court stated in *Associated General Contractors*, 459 U.S. at 536, there are an "infinite variety of claims that may arise" which "make it virtually impossible to announce a black-letter rule that will dictate the result in every case." The court below properly applied the factors set forth by this Court to guide it in the exercise of its judgment in deciding that if the allegations proved true, a remedy is available to Mid Atlantic under the RICO Act.

In *Holmes*, this Court was concerned with the risks of multiple recoveries and persons "who complained of harm flowing merely from misfortunes visited upon a third person by the defendant's acts." 112 S. Ct. at 1318. That is not the situation here. There is no risk of multiple recovery and the harm to Mid Atlantic is not "merely" misfortunate. The alleged harm to Mid Atlantic is deliberate and distinct from that to the customers. The claim asserted by Mid Atlantic against LDS and Rice is clearly allowed under this Court's decision in *Holmes*.

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1. In *Holmes*, 112 S. Ct. at 1317 n. 11. This court noted *Brandenburg* as a case requiring proximate causation under RICO.

II.

THE DECISION BELOW IS NOT INCONSISTENT WITH THE DECISIONS OF OTHER COURTS OF APPEAL IN ITS APPLICATION OF PROXIMATE CAUSE FACTORS.

LDS and Rice claim that in the circuits there is a lack of uniformity "in their notions of what proximate cause entails." (Petition at 5). There is no such lack of uniformity. By its nature, a determination of whether proximate cause exists is a case specific determination. In the published appellate decisions applying "proximate cause" standards to RICO claims, the courts have reviewed those factors enumerated by this Court in *Holmes* and *Associated General Contractors,* and in cases presenting scenarios similar to that presented herein the courts have found proximate cause to exist. For example, in *Bieter Co. v. Blomquist,* 987 F.2d 1319, 1326 (8th Cir. 1993), the court found that a competitor developer was proximately and directly injured by defendants' bribery of city officials because the bribery was intended to prevent plaintiff's proposed development from receiving the necessary approval and to assure approval of a competing development. Similarly, in *Standardbred Owners Association v. Roosevelt Raceway Associates,* 985 F.2d 102, 104 (2d Cir. 1993), the court found that horse owners and their organization's injuries were proximately caused by the racetrack owner's fraud in obtaining bonds from the town when the owner intended to close the track since their injury was not derivative of any injury sustained by the revenue authority and was direct, inevitable and must have been anticipated. In *Schiffels v. Kemper Financial Services, Inc.,* 978 F.2d 344 (7th Cir. 1992), the court held that a person can state a claim under § 1962(c) even if the RICO predicate acts of fraud were not committed against the person so long as the complaining person's injury was caused "by reason of" the predicate acts.

LDS and Rice have not identified any dispute among the circuits as to the application of the proximate cause factors under the RICO Act. The infinite variety of fact situations make it impossible to set down a precise black-letter rule to determine whether there is proximate cause. Instead, the court below evaluated the various factors necessary to determine whether the specific facts alleged herein establish proximate cause as a matter of law.

III.

THERE IS NO ISSUE PRESENTED AS TO WHETHER LDS AND RICE COMMITTED MAIL OR WIRE FRAUD.

LDS and Rice properly point out that where the RICO predicate acts are violations of the mail and wire fraud statutes, a plaintiff must show that the defendants "engaged in a scheme to defraud, that they used the mails and wires in furtherance of the scheme, and that they acted with the specific intent to defraud." (Petition at 7). Here, all of those facts are alleged in the Amended Complaint. LDS and Rice's error is in their conclusion that since LDS and Rice sent no fraudulent information to Mid Atlantic through the wires or the mails, and since Mid Atlantic could make no wire or mail fraud claim (hypothetically assuming a private cause of action for violation of 18 U.S.C. §§ 1341, 1343), Mid Atlantic can assert no RICO claim. However, 18 U.S.C. § 1964(c) provides for recovery by "any person injured in his business or property by reason of a violation of section 1962". Mid Atlantic is claiming injury by reason of LDS and Rice's predicate acts of wire and mail fraud. It is not claiming and need not claim that LDS and Rice sent any wire or mail communications to it to maintain its RICO claim. Significantly, unlike the situation in *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786 (1st Cir. 1990), the scheme herein was intended to deceive both customers and Mid

Atlantic and was a scheme to defraud both Mid Atlantic and its customers of money. In *McEvoy,* no one was deceived by the wire and mail fraud and no one was defrauded of money or property.[2]

Mid Atlantic has alleged injury to its business or property suffered by reason of LDS and Rice's alleged predicate acts of mail and wire fraud. A proper RICO claim has been stated.

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2. *Lancaster Community Hospital v. Antelope Valley Hospital District,* 940 F.2d 397, 406 (9th Cir. 1991), *cert. denied,* ___ U.S. ___, 112 S. Ct. 2268 (1992), also cited by LDS and Rice, is inapposite and lends nothing to their argument. Therein, the court held that plaintiff failed to specify facts relating to the alleged use of the mails as required under Federal Rule of Civil Procedure 9(b). That is not an issue here. *Midwest Grinding Co. v. Spitz,* 976 F.2d 1016 (7th Cir. 1992), also cited by LDS and Rice, held that plaintiff had not alleged fraud with the required specificity and had not alleged the continuity required to make out a pattern of racketeering activity. Once again, that is not at issue in this case.

CONCLUSION

The decision below does not conflict with *Holmes v. Securities Investor Protection Corp.*, ___ U.S. ___, 112 S. Ct. 1311 (1992), and there is no dispute among the circuits which would justify the grant of the petition for writ of certiorari. Moreover, there are no significant issues of general application in that the application of the proximate cause standards in any case are highly fact specific. Accordingly, this Court should not issue the requested writ of certiorari.

Respectfully submitted,

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